

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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HSBC BUSINESS CREDIT USA, INC.,

Plaintiff-Appellee,

v

PAUL J. KELLEY, PATRICIA A. KELLEY, and  
BETTY JANE YERINGTON,

Defendants-Appellants.

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UNPUBLISHED

January 15, 2004

No. 241831

Ottawa Circuit Court

LC No. 01-039627-CZ

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendants appeal as of right from the judgment granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). This action was filed by plaintiff in an attempt to recover the balances owed on the repayment of business loans made by plaintiff to West Shore Construction Company for equipment. West Shore filed for Chapter 7 bankruptcy protection, and plaintiff sought recovery on the outstanding loan balances from defendants, all of whom signed personal guaranties for the loans. With its summary disposition motion, plaintiff provided the court with an affidavit in which its vice president averred that the amounts owed on the loans, including attorney fees and expenses, totaled \$411,463, which total reflected a reduction in the monies owed predicated on the sale of secured equipment at auction. The trial court concluded that defendants, acting pro per and failing to conduct any discovery, did not provide sufficient evidence to rebut the affidavit. Therefore, the trial court granted plaintiff's summary disposition motion. We affirm.

On appeal, defendants argue that plaintiff unjustifiably impaired collateral and should have sold other collateral in a commercially reasonable manner. Defendants maintain that plaintiff sold the collateral in an improper manner, and at far too cheap a price, and thereby violated New York law, which controls under the relevant documents executed by the parties. Defendants also argue that unsold collateral remains. It is further argued that the trial court granted summary disposition as a punishment for defendants' failure to conduct discovery. We note that defendants additionally argue that they did not receive sufficient notice of the sale of the collateral, nor an accounting, as required by New York law. However, defendants failed to make this argument below, and are thus precluded from arguing it on appeal. Moreover, defendants submitted no documentary evidence showing prejudice as a result of any lack of notice.

Plaintiff argues that defendants had the burden to submit documentary evidence to show the existence of an issue of material fact. Plaintiff asserts that defendants merely raised questions, which the trial court properly found is not sufficient to defeat a motion for summary disposition. We agree with plaintiff and the trial court.

In reviewing a motion for summary disposition, the trial court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Abbott v John E Green Co*, 233 Mich App 194, 197; 592 NW2d 96 (1998). However, once the moving party establishes its position supported by documentary evidence, unless the nonmoving party establishes an issue of material fact by documentary evidence, summary disposition is properly granted. *Id.* at 198.

The trial court found that plaintiff's affidavit was sufficient documentary evidence to establish the amount owed. The court found the affidavit "clear and unambiguous." The affidavit stated the specific amount owed, and how that amount was reached--via the balance on the notes minus what was recovered through the sale of the collateral at auction plus expenses and attorney fees.

In contrast, defendant Paul Kelley's affidavit is without any specific information as to what is owed, or the value of the collateral sold by plaintiff. At the hearing on the motion for summary disposition, Paul Kelley informed the trial court that defendants had no idea how much was owed, and when asked by the court what plaintiff did wrong with respect to the collateral, Kelley responded that defendants did not really know. He further acknowledged that defendants failed to conduct any discovery. Kelley then proceeded to speculate as to problems related to the sale of the collateral. This is simply insufficient for purposes of summary disposition under MCR 2.116(C)(10).

Plaintiff provided evidence of the amount owed and amount received through sale of the collateral at auction, carrying its initial burden, but defendants failed to rebut plaintiff with sufficient documentary evidence; therefore, the trial court properly ruled in favor of plaintiff.<sup>1</sup> It is unnecessary for us to explore the myriad legal arguments made to us by defendants in regard to what plaintiff should have done with the collateral and the perfection of security interests under New York law, because ultimately defendants failed to submit documentary evidence as to what actually transpired with respect to the collateral.<sup>2</sup> Finally, we reject defendants' contention

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<sup>1</sup> We acknowledge that Paul Kelley's affidavit does aver in some paragraphs as to the disposition or perfection of some collateral. But the statements are made "upon information and belief" as to what occurred and reflect a lack of personal knowledge and direct proof of events, along with interjecting hearsay. The speculative nature of the affidavit is evidenced where Kelley avers that he "has not received sufficient information as to the disposition of collateral so as to be fully informed as to its original extent, its value, and its disposition . . . ." The affidavit is simply legally insufficient. With respect to any collateral that may still be retained by plaintiff and subject to sale, plaintiff correctly pointed out to the trial court that this does not preclude summary disposition, but rather, any subsequent sale would reduce the amount owed on the judgment.

<sup>2</sup> We note that even if we viewed § 3-606 of the New York Commercial Code, as argued by  
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that the trial court granted plaintiff's motion for summary disposition as a punishment for failing to conduct discovery. Rather, the trial court granted summary disposition on the basis of defendants' failure to submit sufficient documentary evidence to create a factual issue, which defendants may have been able to submit had they undertaken discovery.

Affirmed.

/s/ Jane E. Markey  
/s/ William B. Murphy  
/s/ Michael J. Talbot

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defendants, the provision applies only to negotiable instruments and not a guaranty on a loan. *Manufacturers & Traders Trust Co v International Packaging, Inc*, 207 AD2d 982, 983; 617 NYS2d 91 (1994). Defendants' reliance on *Port Distributing Corp v Pflaumer*, 880 F Supp 204, 209 (SD NY, 1995), *aff'd* 70 F3d 8 (CA 2, 1995), is misplaced because it is factually distinguishable, where there the federal court found that, although a guaranty is not ordinarily considered a negotiable instrument, the guaranty could be considered a negotiable instrument because it was annexed to, and made part of, the promissory note creating a single document. No such facts exist here. Further, assuming that New York law requires more detail than Michigan law concerning the establishment that collateral was disposed of in a commercially reasonable manner, plaintiff's affidavit providing that the collateral was sold at auction implicitly suggests that the sale was accomplished in a commercially reasonable manner, or at least minimally, it was sufficient so as to require defendants to submit evidence that the sale was not done in a commercially reasonable manner. No such evidence was submitted. Defendants do not cite any New York law which shows that, at a summary disposition stage, burdens are placed on the parties contrary to Michigan law.